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MONTANA PROSECUTOR

November/December, 1979 Volume 3, No. 5

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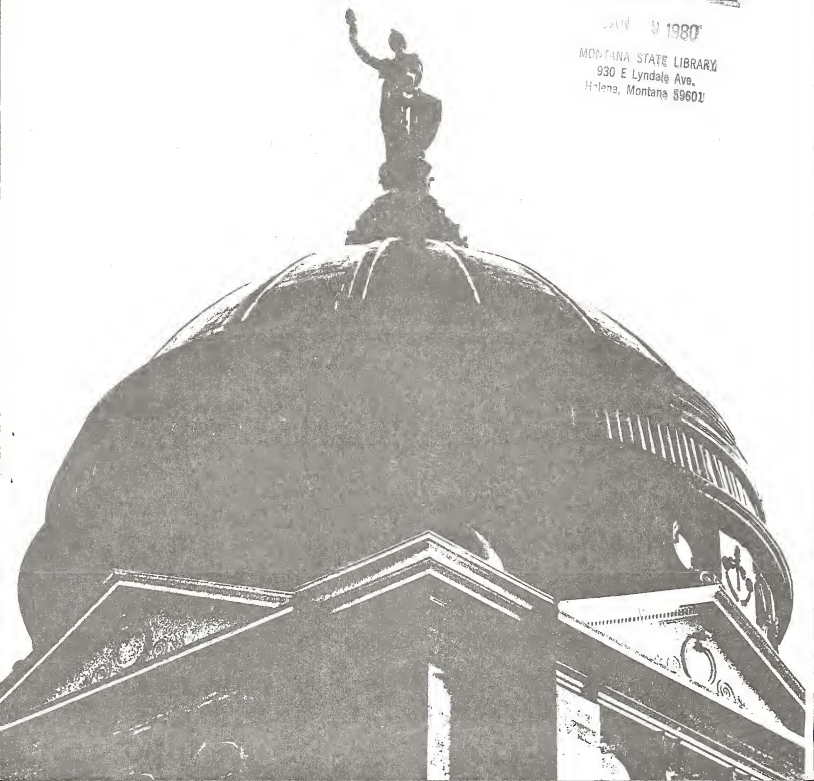

INTRODUCTORY NOTES

HOUSE BILL 621 - SPOUSE ABUSE REPORTING

All county attorneys are reminded of the requirements of House Bill 621 concerning the collection of statistics on domestic violence and spouse abuse. The language of House Bill 621 creates a mandatory duty to report to SRS. For the month of November, 1979 only eight out of fifty-six counties submitted a report to SRS. SRS has requested that all county attorneys be informed that a report form must be forwarded to SRS each month even if there were no reportable incidents during that month. Also if any suggestions for revision of the reporting form exist please forward them to Natalie Cannon, SRS, Helena, Montana, 59601.

FORENSIC REVIEW BOARD

To improve the process surrounding forensic evaluations at Warm Springs State Hospital, the Forensic Review Board has been created. A memo detailing the operation of the Board is enclosed. In addition to the members of the Board listed in paragraph II of the memo, the county attorney of the county from which the patient was referred will be notified and extended an opportunity to participate in the Board's review as detailed in the enclosed letter from Dr. Hamill.

OUT-OF-STATE TRAINING

The out-of-state training grant was approved by the Montana Board of Crime Control in the amount of $2,500.00. Written applications for out-of-state training should be directed to Marc Racicot, County Prosecutor Services Bureau, 303 Roberts, Helena, Montana 59601. In turn the applications will be referred to the Association's training committee for approval. All requests will require a 50% local "match".

LEGISLATION

Matters of legislative interest should be forwarded to Marc Racicot for inclusion in the legislative package that will be presented by MCAA.

RECENT CASES AND NOTES

COUNSEL - FIFTH AMENDMENT

Barring defendant's counsel from testifying did not impermissibly force the defendant to testify. State v. Johnson, (Ariz.) 594 P.2d 514.

JURY - FAIR TRIAL

Even if the newspaper account of a scuffle the defendant started outside the jury room door contained an inaccurate statement, the inaccuracy was not such that it would prejudice the defendant. The jurors indicated that they could still be impartial, so defendants were not denied a fair trial. State v. Johnson (Ariz.) 594 P.2d 514.

MIRANDA - INSTRUCTIONS

Since Miranda warnings apply to the admissibility of the confession, not its voluntariness, a jury instruction on the voluntariness of confessions issue need not include a mention of Miranda rights. (Case has a good review of when voluntariness of confession instructions are necessary.) State v. Stone (Ariz. App.) 594 P.2d 558.

MIRANDA - VOLUNTARINESS OF STATEMENT

Even if later Miranda warnings were incomplete, one of the arresting officers read defendant his rights from a card, which included a warning that appellant had a right to an attorney prior to and during questioning. "[O]nce a defendant has been fully advised of his rights, there is no requirement that the warnings be repeated each time questioning is resumed." State v. Stone, (Ariz. App.) 594 P.2d 558.

POLICE NOTES - EVIDENCE DESTRUCTION

Even though the officer's notes contained many things not contained in his police report, failure to preserve the notes was not reversible error in this case since defendant failed to demonstrate prejudice. The court suggests that officers substantially incorporate the handwritten notes into their report in case the notes are lost or destroyed. State v. Johnson (Ariz.) 594 P.2d 514.

PROSECUTORS - JUVENILES

The prosecutor is the person in the system who determines whether charges should be filed against juveniles. Even if the probation officer has determined that charges should not be filed and should be "adjusted", the prosecutor may, "not-withstanding the opinion of the probation officer", deem it necessary in the public interest to file a petition alleging delinquent behavior. Matter of Maricopa County, Juvenile Action, Etc. (Ariz.) 594 P.2d 506.

SHACKLES - HANDCUFFS

The court acted properly in shackling defendant since the court heard evidence of the defendant's prior violent conduct and it chose the least conspicuous restraint. The court is not required to wait for an escape or other violent event before acting. State v. Johnson (Ariz.) 594 P.2d 514.

ENTRAPMENT - INSTRUCTION

For a good jury instruction (verbatim in opinion) on entrapment which tells the jury that defendant can be found guilty even if the government aided and encouraged defendant, see Hill v. State (Nev.) 594 P.2d 699.

DEPOSITION

Granting defendant a deposition was an abuse of discretion where the defense had a four page statement the prosecutrix gave police, a 118 page deposition and 200 pages of trial testimony by the prosecutrix. The trial testimony was at least the equivalent of a preliminary hearing, after which no deposition is allowed, and the issue of consent had already been thoroughly explored. State v. Superior Court In and For County of Pima, (Ariz.App.) 596 P.2d 732.

FORFEITURE

The city was not entitled to storage charges on a vehicle it seized for transporting narcotics, after the forfeiture action was dismissed on the city's motion. Fitzhugh v. City of Douglas (Ariz.App.) 596 P.2d 737.

RELEVANCE - THREATS

Defendant's statement that he should have killed a guard when he had the chance during a previous escape was relevant, under Rule 401, in his escape trial. The statement went to the central issue of intent, since the defense was duress, and was properly admitted under Rules 402 and 403. State v. Starks (Ariz.) 596 P.2d 366.

SHACKLES - HANDCUFFS

It was proper to shackle a defendant who was on trial for an armed escape from a previous pretrial hearing. State v. Starks (Ariz.) 596 P.2d 366.

SUFFICIENT EVIDENCE - LESSER INCLUDED OFFENSE

Aggravated assault is a lesser included offense of murder, so defendant was properly convicted of accessory to aggravated assault even though she was charged as an accessor to an open charge of murder. Appellant concealed the unconscious child from authorities and initially lied to investigating authorities prior to the child's death, in order to protect her husband. State v. Dailey (Ariz.App.) 596 P.2d 716.

ARGUMENT

Argument that the testimony of defendant's brother had been fabricated was permissible, since there were serious inconsistencies in the brother's testimony. People v. Bedolla (App.) 156 Cal. Rptr. 171.

BUSINESS RECORDS - HEARSAY

A telex copy of bank records did not fall within the business records exception to the hearsay rule. The telex was not prepared at or near the time of the acts reported, it was not sent in the regular course of business and it was within the court's discretion to doubt the trustworthiness of the telex. United States v. Kim (D.C. Cir.) 595 F.2d 755.

BREATHALYZER AMPOULES

Whether the breathalyzer ampoules were adequately preserved for retesting is a question of fact, and defendant must show that the ampoule could have been retested, prior to getting the results of original analysis suppressed. State v. Wood (Or.App.) 596 P.2d 1325.

COMPETENCY OF COUNSEL

The defendant was not denied effective representation of counsel when the court limited the amount allowed for his attorney fees to $500.00. The fact that counsel was underpaid did not, in itself, justify reversal and the defendant did not show any prejudice. State v. Nelson (Iowa) 279 N.W.2d 1.

DEATH PENALTY - JURORS

The court did not err in granting the prosecutor's challenge for cause of two potential jurors who were irrevocably committed to vote against the death penalty regardless of the facts and circumstances of the case. Williamson v. State (Ala.Cr.App.) 370 So.2d 1054.

CONFESSION - FRUIT OF POISONOUS TREE

Where defendant's first confession was inadmissible because he was so intoxicated that he didn't know what he was saying, his second confession, 16 hours later, was not rendered inadmissible because of the fruit of the poison tree doctrine. The suppression of the first confession was based solely on intoxication and there was no cause and effect relationship with the second confession. Kennedy v. State (Ala. Cr. App.) 371 So.2d 464.

CONFRONTATION - FINGERPRINT

Testimony by the officer that he didn't take fingerprints from the victim's wallet because there was ample evidence against defendant, consisting of the victim's statements and a bystander's statements, did not violate defendant's right of confrontation. The testimony was properly admitted with a cautionary instruction, the right of confrontation does not apply to out-of-court statements used for nonhearsay purposes. State v. Carter (Wash. App.) 596 P.2d 1354.

DRUGS AND NARCOTICS

An offer to supply "other contraband and marijuana," as well as the heroin appellant was convicted of possessing to distribute, was relevant under Rule 404(b) and properly admitted. United States v. Moreno-Nunez (9th Cir.) 595 F.2d 1186.

DRUGS AND NARCOTICS - PRIOR BAD ACTS

The court properly admitted evidence of two prior narcotics arrests in defendant's trial for possession of heroin. The evidence was highly probative of the defendant's intent to commit the charged offenses and defendant had put his intent to possess the narcotics into issue. The two prior offenses required the same intent as the charged offense and the arrests had occurred within the same year. United State v. Black (5th Cir.) 595 F.2d 1116.

ELECTRONIC SURVEILLANCE

The trial court properly admitted tape recording of defendant's jailhouse conversations with his relatives. Incarcerated persons have no reasonable expectation of privacy with respect to their conversations and defendant even told one visitor that the conversation was being recorded. People v. Estrada (Cal.App.) 155 Cal. Rptr. 731.

JUVENILES - SEARCH AND SEIZURE

Where a locked toolbox belonged to a 17-year-old juvenile, officers could not search the box under the consent of the juvenile's father when the father claimed no interest in the box or its contents. In Re Scott K (Sup.) 155 Cal. Rptr 671.

LESSER INCLUDED OFFENSES - INSTRUCTIONS

One judge was not required to give an assault instruction in defendant's murder trial. Although everyone shot at/into the victim, defendant fired first, shooting the victim in the back of the head and killing him instantly. Sanders v. State (Del.Supr.) 401 A.2d 629.

MIRANDA - ARREST

An officer who told defendant and a compànion not to drive because they were intoxicated, and who observed them switching places after he stopped them, did not violate Miranda when he asked defendant why he had changed places with the passenger. Although the officer had determined in his mind they weren't free to go, this did not determine whether they were in custody; the court found they weren't in custody and admitted defendant's statement he switched places because he was driving on a revoked license. State v. Ferrel (Or.App.) 596 P.2d 1011.

PROSECUTORS

Prosecutors interested in writing books about their famous cases should read Forsher v. Bugliosi, (Cal.App.) 155 Cal. Rptr. 811 in which Vincint Bugliosi is sued for libel by a minor character in his book, Helter Skelter. (Good dissent)

SEARCH AND SEIZURE

Defendant's failure to "allege or prove a proprietary or other interest in the car, the apartment or any of the items (robbery evidence) searched and seized," meant he lacked standing to contest the warrantless searches and seizures. Hicks v. State (Nev.) 596 P.2d 505.

SEARCH AND SEIZURE - STANDING

A stipulation to the defendant's possessory interest in seized cocaine was sufficient to confer standing on him to contest the seizure. United States v. Mazzelli (9th Cir.) 595 F.2d 1157.

SEARCH AND SEIZURE - STANDING

Defendant lacked standing to contest the police entry of a vehicle, in which he was later arrested, in order to check the vehicle identification number. Although defendant may have had an expectation of privacy in the stolen car while it sat empty in an unusual place, society is unwilling to recognize the expectation as legitimate, since defendant's possession of the car was wrongful. State v. Abordo (Hawaii) 596 P.2d 773.

SEARCH WARRANT

Where some of the items taken in a burglary were found in defendant's car, but some were missing, and the location and time of the stop of defendant's car were such that he could have driven by his home, "the residence was a reasonable place to search." State v. O'Keefe (Or.App.) 596 P.2d 987.

SENTENCING - ACQUITTAL

Considering defendant's acquittal of a state narcotics charge during sentencing did not violate defendant's due process, jury trial or double jeopardy rights. United States v. Morgan (9th Cir.) 595 F.2d 1134.

VOIR DIRE - DEATH PENALTY

The court properly denied a defense motion that no death qualification questions be asked of the potential jurors. Whisenhant v. State (Colo. Cr. App.) 370 So.2d 1080.

CONTINUANCE

Counsel asking for a continuance without defendant's knowledge or consent waives the time for Rule 8 purposes unless, possibly, the continuance so prejudiced defendant that he was denied a fair trial. That was not the case here, defendant failed to show that the alibi witnesses he allegedly lost existed, or that the delay lost them. State v. Kelly (Ariz.) 597 P.2d 177.

SEARCH AND SEIZURE

A police officer who learned three days after defendant's arrest for burglary that a watch had been taken in the burglary did not need to get a warrant before he went to jail and seized the watch from the items taken from defendant at booking. State v. Jenson (Ariz.) 597 P.2d 554.

BAIL - BOND

The court did not err in sua sponte increasing the defendant's recognizance bond after the return of the guilty verdicts. Keys v. State (Ind.) 390 N.E.2d 148.

PROSECUTOR - DISQUALIFICATION

The fact that the prosecutors were defending the board of supervisors in a jail conditions suit defendant filed after he was arrested did not establish the appearance of impropriety and did not disqualify the prosecutors from prosecuting the criminal action against defendant. State v. Lucas (Ariz.) 597 P.2d 192.

RAPE - INSTRUCTIONS

Rejecting the "rape is an easy charge to make" instruction (verbatim in opinion) is proper since it is incorrect. Several other defense instructions about rape, resistance, intimidation and force (verbatim in opinion), were all properly rejected. State v. Reinhold (Ariz.) 597 P.2d 532.

JURY

The Supreme Court ruling in Brasfield v. United States, which prohibits judicial inquiry into the numerical division of a deadlocked jury is a rule of judicial administration based on the supervisory powers of the Supreme Court over the federal court system. Since it is not a constitutional interpretation, it may not be applied to the states via the Fourteenth Amendment. Ellis v. Reed (4th Cir.) 596 F.2d 1195.

OBSCENITY

Lewd exhibition of the genitals constitutes hard core sexual conduct which may be constitutionally proscribed. The prohibited materials need not be limited to sex acts. Raymond Heartless, Inc. v. State (Del.Super.) 401 A.2d 921.

POLICE - OFF-DUTY OFFICERS

Defendant was properly convicted for assaulting an officer, even though the officer was off-duty and outside his jurisdiction, since the officer was attempting to perform an official act, arresting defendant for burglary. People v. Rael (Colo.) 597 P.2d 584.

DRUGS AND NARCOTICS

A "massive amount" of drugs and paraphernalia in plain view in defendant's apartment was sufficient evidence of constructive possession. Womack v. Commonwealth (Va.) 255 S.E. 351.

JUDICIAL NOTICE - VENUE

The court did not err when it took judicial notice that the DWI offense occurred within the court's jurisdiction. Commonwealth v. Varner (Pa.Super.) 401 A.2d 1235.

PRE-INDICTMENT DELAY

Even if defendant was prejudiced by a preindictment investigative delay, the delay did not deprive him of due process absent some improper reason for the delay. Here the delay was to allow the prosecutor to gather evidence against other conspirators. United States v. Valenzuela (9th Cir.) 596 F.2d 824.

PRIOR BAD ACTS

Where defendant was charged with auto theft, evidence of his theft of a starter pistol, 20 minutes before taking the car, was admissible since the first theft was part of the larger plan to steal the car. State v. Delahunt (RI) 401 A.2d 1261.

RAPE

Where the defendant in a rape case raised an alibi defense rather than consent, evidence of past sexual activity between the defendant and the victim was not material, and its exclusion was not prejudicial error. State v. Graham (Ohio) 390 N.E.2d 805.

RAPE - DOUBLE PUNISHMENT

Where defendant perpetrated three distinct sex offenses with the same victim, within a 15 minute period, the defendant could be prosecuted and convicted for three offenses. Van Dyke v. Commonwealth (Ky) 581 S.W.2d 563.

ROBBERY

Defendant was properly convicted of armed robbery although the victim did not have a weapon pointed at her at the time the property was taken. The defendants had previously used the gun during victim's rape, and the continuing threat was sufficient to justify the armed robbery conviction. State v. Joyner (N.C.) 255 S.E.2d 390.

WITNESSES - PRISON INMATES

In a case involving a prison assault, testimony regarding the "prison code" disfavoring "snitching", which tended to bolster the credibility of government inmate/witnesses, was at most harmless error. United States v. Davidson (10th Cir.) 597 F.2d 230.

SPEEDY TRIAL

Any delay caused by summoning additional jurors, because the panel was exhausted, does not violate speedy trial requirements. State v. Reverio (Hawaii) 595 P.2d 1069.

FLIGHT - INSTRUCTIONS

Evidence that defendant left the rape scene through the kitchen window, lost his pursuers by speeding through a residential area with his lights off, never returned to his apartment or to his job to pick up a paycheck and was arrested three months later was sufficient to sustain giving a flight instruction. State v. Gray (Ariz.) 595 P.2d 990.

INTOXICATION - INSTRUCTIONS

Evidence that defendant had smoked marijuana, taken drugs for a nervous condition and mumbled, squinted, and looked down a lot was insufficient to require an instruction on the effect of intoxication on voluntariness of statements. The victims and numerous police officers testified that defendant was coherent and did not seem to be intoxicated. State v. Porter, (Ariz.) 595 P.2d 998.

VOLUNTARY STATEMENTS - INSTRUCTIONS

Failure to give voluntariness of statement jury instructions when defendant requests them is reversible error. Further, failure to instruct the jury that if insanity meant defendant couldn't understand his statements, the statements were inadmissible is reversible error, assuming there is evidence to justify the instruction. State v. Porter (Ariz.) 595 P.2d 998.

ARGUMENT

The prosecutor's reference to the defendant as a "burglarizing, cop-hating man" was not error when it was supported by the record. Whittington v. State (Tex. Cr. App.) 580 S.W.2d 845.

ARREST

Where defendant was asked to answer some questions at the police station and confessed after a seven hour interrogation, his confession was not the product of an illegal arrest. Since defendant had been informed that he was not under arrest, had not been handcuffed or searched, had been allowed to leave the room without supervision twice, and had been told he was free to leave, he was not under arrest during the questioning. Giles v. United States (D.C.) 400 A.2d 1051.

BRUTON - ENTRAPMENT

The admission of a codefendant's prior statements which implicated the defendant was harmless error where defendant admitted committing the offenses and the only issue was entrapment. United States v. Vissars (9th Cir.) 596 F.2d 400.

CHALLENGE FOR CAUSE-JURY

The court did not abuse its discretion in refusing a defense challenge for cause where a potential juror said on voir dire that he had the impression that the defendant had done something wrong but that he could put the impression aside and make a decision solely on the evidence. Hammill v. State (Wis.) 278 N.W.2d 821.

DEATH PENALTY

The Virginia death penalty statute is constitutional. The defendant satisfied both of the aggravating circumstances in the Virginia statute. His conduct: raping, torturing and setting the victim on fire, was clearly "outrageously and wantonly vile." His prior history reflected a propensity to commit other violent criminal acts thus constituting a continuing threat to society. Mason v. Commonwealth (Va.) 254 S.E.2d 116.

DOUBLE JEOPARDY - MISTRIAL

Where the court instructed the jury that it could reach a verdict as to any defendant or count, it did not err in declaring a mistrial because of a hung jury without inquiring whether the jury had reached a partial verdict for any of the counts or defendants. Therefore, the defendant's second trial did not violate his double jeopardy rights. United States v. MacQueen (2nd Cir.) 596 F.2d 76.

DEALTH PENALTY - RAPE

Kidnapping, multiple gang-raping/sodomizing, then taking the victim off into the woods and beating her to death with a tire iron constituted a killing that was "outrageously or wantonly vile, horrible or inhumane in that it involved torture or depravity of mind." Collins v. State (Ga.) 253 S.E.2d 729.

EXPERTS - HOMICIDE

An expert's opinion, that the victim would not have died if she had received immediate medical attention, was admissible on the issue of malice. State v. Locklear (N.C.App.) 254 S.E.2d 653.

INDIGENTS - EXPERTS

Where defendant's conviction did not rest entirely on the state's expert testimony and the experts were not shown to be biased or incompetent, the trial court did not err in refusing to provide funds to defendant to hire his own experts. Hamby v. State (Ga.) 253 S.E.2d 759.

FELONY MURDER - LESSER INCLUDED OFFENSES

The court did not err in refusing to instruct the jury on lesser included offenses, second degree murder and manslaughter, where only felony murder was submitted to the jury, and there was no evidence that the killing did not occur during the commission of a felony. The fact that the victim was shot by a bystander trying to prevent the robbery did not bar defendant's conviction for felony murder. State v. Moore (Mo.) 580 S.W.2d 747.

FLIGHT - INSTRUCTIONS

Proof of actual knowledge by defendant that the police wanted him is unnecessary prior to giving a flight instruction. There was sufficient evidence here to justify the flight instruction. State v. Walker (Kan.) 595 P.2d 1098.

PHOTOGRAPHS

Photos of the murder victims' bodies were admissible to illustrate the knife wounds inflicted on them. The fact that the bodies were partially decomposed and the pictures were taken after the bodies were exhumed for a second autopsy, did not prevent their admission. State v. Sledge (N.C.) 254 S.E.2d 579.

PROSECUTOR

Where a witness waffled on an identification at a suppression hearing and the prosecutor visited the witness at the jail and reminded him of his previous positive identification and of the penalty for perjury, the prosecutor was not guilty of misconduct and the defendants were not denied due process by the witness's identification of them at trial. Clark v. State (Ind.App.) 389 N.E.2d 712.

THEFT

Defendant's actions, rolling a cartload of meat into a storeroom that was closed to the public and putting the meat into sacks, was sufficient to sustain a conviction for theft since the defendant exercised unauthorized control over the property with the purpose of depriving the owner thereof. Jarret v. State (Ark.) 580 S.W.2d 460.

PRIOR BAD ACTS

Defendant's statement that he was a robber made just before he took the rape victim's money to buy cigarettes and beer, was properly admitted as part of the complete story. State v. Reinhold (Ariz.) 597 P.2d 532.

SENTENCE

Defendant wasn't prejudiced when the court designated his open end offense as a felony because the court wanted to impose three years probation. An open end offense is automatically a felony, and the court could designate the offense as a misdemeanor at the end of the probationary period. State v. Grice (Ariz.) 597 P.2d 548.

AID AND ABET - THEFT

Defendant was properly convicted of conspiracy and theft for providing a market for stolen cars which someone else stole, under an aid and abet theory. Although the legislature had eliminated the word "encourage" from the aid and abet statute, the definition of abet included encouraging. Alonzi v. People (Colo.) 597 P.2d 560.

BRUTON - OPENING THE DOOR

Where the defense attorney attempted to shift the blame to an absent co-participant, evidence of the co-participant's statement that also incriminated the defendant was not a violation of his right to confrontation. United States v. Castro (5th Cir.) 596 F.2d 674.

MIRANDA

Officer, who met an excited female claiming to have been raped by the man asleep in her bed, were merely conducting a preliminary investigation when they awakened defendant. The officers asked who he was, whether he knew the victim, and what her name was. Under these unusual circumstances Miranda was unnecessary. Also Miranda was not required when defendant refused to answer one question since he answered others. State v. Reinhold (Ariz.) 597 P.2d 532.

ARGUMENT - COMMENT ON SILENCE

Where a non-testifying defendant threatened the prosecutor during the course of the trial, the prosecutor could properly refer to the threat during his closing argument. The fact that the prosecutor personally addressed the defendant while discussing the threat did not constitute a comment of his silence. Johnson v. State (Tex.Cr.App.) 583 S.W.2d 399.

BEST EVIDENCE RULE - EVIDENCE

In prosecution for the use of a stolen credit card, the court properly admitted photocopies and microfilm reproductions of the credit card invoice from the defendant's purchases when the police were unable to locate the original invoices. Walker v. United States (D.C. App.) 402 A.2d 813.

BRUTON - WAIVER

The defendant waived his rights, under Bruton, to contest the use of a codefendant's confession when the state moved for a severance and the defendant opposed the motion. McMahon v. State (Tex.Cr.App.) 582 S.W.2d 786.

BURGLARY - STOLEN PROPERTY

If stolen property is positively identified by the victim, the judge may admit the evidence if he determines that it is relevant. "The failure to identify the property by way of its serial number is not fatal to the State's case." People v. Panus (Ill.) 391 N.E.2d 376.

CHAIN OF CUSTODY

Where the arresting officer, who had confiscated a pry bar as evidence, had immediately scratched his initials and the case number on the bar and later testified at trial that he recognized the bar, there was no need to establish a chain of custody to render the pry bar admissible in evidence. Kyles v. State (Ind. App.) 391 N.E.2d 642.

DRUGS AND NARCOTICS - WEAPONS

In a narcotics prosecution, guns found in the defendant's residence were admissible as relevant evidence showing the defendant's involvement with the drug trade. United States v. Martin (9th Cir.) 599 F.2d 880.

IDENTIFICATION - INSTRUCTIONS

The Alaska Supreme Court rejects an instruction (verbatim in opinion) that the testimony of any eyewitness should be received with caution. Dayton v. State (Alaska) 598 P.2d 67.

DWI - HEARSAY

An officer was properly allowed to testify about hearsay concerning where defendant's vehicle had gone, and a CB broadcast indicating defendant had run another car into a ditch. The testimony was offered to show the reason the officer located and stopped defendant's vehicle, and an instruction was given limiting consideration of the evidence to that issue. State v. Jones (Kan.App.) 598 P.2d 192.

ENTRAPMENT

A request by an undercover officer for drugs, by itself, does not justify an entrapment instruction, since defendant must show solicitation and that defendant had no predisposition to sell or possess the drugs. If defendant sells to an undercover officer pretending 'to be an ordinary patron, it is safe to assume that he would make similar sales to other persons.' State v. Hagen (Kan.App.) 598 P.2d 550.

EVIDENCE - HABIT

Where a juvenile was charged with the burglary of an automobile, the trial judge could properly hear circumstantial evidence of the owner's habit of locking his car and draw the reasonable inferences that the vehicle was locked until the defendant entered it. In Re Charles G. (Cal.App.) 156 Cal. Rptr. 832.

FLIGHT - INSTRUCTION

The defendant's conduct of running into another room, which had no exit, as soon as the police announced their presence, was sufficient evidence to justify giving a flight instruction. People v. Cooper (App.) 156 Cal.Rptr. 646.

FLIGHT - PRIOR BAD ACTS

Evidence of the defendant's unprovoked shooting of a police officer and subsequent flight was admissible in the defendant's trial for an earlier murder. The unprovoked assault and subsequent flight were part of an effort to avoid a confrontation with the law enforcement officers and suggested the defendant's consciousness of guilt for the murder charge. Fentis v. State (Tex.Cr.App.) 582 S.W.2d 779.

HEARSAY

The investigating officer's testimony regarding the robbery victim's statements that he had been robbed and could identify some of the perpetrators, was not hearsay since it was not offered to prove the truth of the matter asserted. The purpose of the testimony was not to prove the fact of the robbery itself; it was offered to establish the identification procedures followed by the officer. NcNew v. State (Ind.) 391 N.E.2d 607.

IMPLIED CONSENT

Defendant's conduct in saying, "I don't know", or refusing to reply after he was advised of the consequences of refusing to take a test and asked if he would take a test, justified suspension of his license for failure to take the blood alcohol test. Beck v. Cox (Utah) 597 P.2d 1335.

INSANITY

Even though all of the evidence indicating the defendant's sanity was from lay sources while all of the evidence indicating insanity was from expert witnesses, the fact finder did not abuse its discretion in rejecting the expert testimony and finding that the defendant was sane at the time of the crime. Commonwealth v. Tyson (Pa.) 402 A.2d 995.

INSTRUCTIONS

A California standard jury instruction which provides that adverse inference can be drawn if a defendant takes the stand and fails to explain or deny evidence or facts against him which he can reasonably be expected to explain or deny, did not violate the defendant's Fifth Amendment right to due process. People v. Saddler (Cal.) 156 Cal.Rptr. 871.

JURY

The judge did not abuse his discretion by excusing a juror for tardiness. The judge made an effort to locate the juror, but he was unable to determine whether she would appear at all. Waiting only 25 minutes before excusing the juror was not an abuse. United States v. Makres (7th Cir.) 598 F.2d 1072.

JURY - DEATH PENALTY

The court did not err when it sustained the prosecutor's challenge for cause of a prospective juror who testified that her opposition to the death penalty would affect her deliberation on the issue of facts submitted at the punishment phase of a trial. Bell v. State (Tex.Cr.App.) 582 S.W.2d 800.

JURY - MURDER

The jury was instructed, disjunctively, on three separate theories upon which the defendant could be convicted of murder - direct commission, aiding and abetting, and conspiracy. It was not necessary that the jury, in finding the defendant guilty of murder, unanimously agree as to the theory of liability. Holland v. State (Wis.) 280 N.W.2d 288.

MANSLAUGHTER - CHILD ABUSE

The defendant's failure to protect her child from beating and abuse by her boyfriend over a several week period was sufficient to justify her conviction for involuntary manslaughter. Commonwealth v. Howard (Pa.Super.) 402 A.2d 674.

MIRANDA

The fact that the arresting officer could not remember the contents of the "Miranda rights" while testifying at the suppression hearing did not establish that the defendant was not properly informed of his rights. The officer testified that he had read the warnings from a printed card and the defendant introduced no evidence that the warnings were given improperly. State v. Tague (La.) 372 So.2d 555.

MIRANDA

A police chief's brief and neutral question "What's going on?" was a natural reaction to the sight of a long-time acquaintance being held in custody, and did not constitute interrogation. The defendant's admissions in response to the question were admissible. State v. Simoneau (Me.) 402 A.2d 870.

PLEA BARGAINS

A Federal District Court judge is free to decide whether and to what degree he will entertain plea bargains, and he may refuse to consider any plea bargaining whatsoever. In re Yielding (8th Cir.) 599 F.2d 251.

PRIOR BAD ACTS

A robbery of a different store in the same chain, 43 hours prior to the charged robbery, while armed with a gun, late at night, when the only other person present was a female employee, was sufficiently similar to the charged robbery to be admissible to show defendant's identity. The fact he also raped the first robbery victim did not make the crimes too dissimilar. People v. Reed (Colo.App.) 598 P.2d 148.

RAPE

It was found to be constitutionally proper, under the Ohio shield law, to exclude evidence that the victim had engaged in prostitution. State v. Cardner (Ohio) 391 N.E.2d 337.

ROBBERY

The defendant was properly convicted of robbery when he took several items in his mother-in-law's purse after shooting her. Although the victim was either dead or comatose when her purse was rifled, the taking could not have been accomplished without the earlier force. Oglesby v. State (Ga.) 256 S.E.2d 371.

RAPE - PSYCHIATRIC EXAM

The trial court abused its discretion in ordering the complaining witness in a rape case to undergo a psychiatric examination. Although the court has the power to order such an examination, the defense must adequately demonstrate the need for the examination. The defense arguments in this case were inadequate: the witness was a "highly nervous person", the offense occurred two years before the hearing, the complaint was uncorroborated and the information was necessary to attack the witness's credibility. When the court does order a psychiatric exam, the judge rather than the defense attorney should select the psychiatrist. People v. Freeman (Mich.) 280 N.W.2d 446.

SEARCH AND SEIZURE - DOGS

Taking a 'canine cannabis connosseur' on a routine tour through the Greyhound baggage area was either not a search, or the defendant lacked a reasonable expectation of privacy in the area, so the "search" was not an illegal search. The case comes within the 'plain smell doctrine'; the dog alerting on one piece of baggage constituted probable cause to get a search warrant to search that piece of baggage. State v. Wolohan (Wash.App.) 598 P.2d 421.

TAMPERING WITH A WITNESS

The court holds the testimony tampered with need not be material testimony, and that the trial court erred in instructing the jury that the testimony tampered with had to be material. Thus, defendant could have been convicted for asking a witness in a civil breach of contract suit not to mention sexual intimacies between defendant and the witness. People v. Francois (Colo.) 598 P.2d 144.

VOLUNTARINESS OF STATEMENT - STANDING

Where the defendant's confession was never admitted into evidence, the question of its voluntariness and admissibility was not before the reviewing court. A codefendant's argument, that his confession was obtained by using the defendant's involuntary confessions and was the fruit of the poisonous tree, was rejected. Even if the defendant's confession was illegally obtained, the codefendant had no standing to attack it. McMahon v. State (Tex. Cr.App.) 582 S.W.2d 786.

WEAPONS - ASSAULT WITH A DEADLY WEAPON

While feet and shoes are not deadly weapons per se, the manner of use in particular situations may make them deadly weapons. Here the victim was kicked in the face. Helton v. State (Ala.Cr. App.) 372 So.2d 390.

ARGUMENT

A prosecutor's references to the rape victim as "a young twenty-one year old epileptic", "a half-blind college student", "an epileptic virgin orphan" and an "innocent young orphan and virgin" was a proper comment on the evidence. State v. Sports (N.C.App.) 255 S.E.2d 631.

ARREST

Nine agents' conduct when they stopped the defendants' taxi and took them to different locations around the cab, constituted an arrest rather than an investigatory stop. United States v. Beck (9th Cir.) 598 F.2d 497.

ARSON EXPERT WITNESSES

A fire inspector, who had attended investigative schools and had been an investigator for six years, could qualify as an expert to testify concerning the flamability of certain materials. Harris v. State (Ala.Cr.App.) 371 So.2d 979.

FIFTH AMENDMENT - STANDING

The right against self-incrimination is personal in nature and a wife has no standing to complain about a violation of her husband's rights. State v. Beaulieu (N.H.) 402 A.2d 178.

HEARSAY - RULE 801

The defendant's agent, who was also a paid government employee, could make statements which were admissible as admissions imputed to the defendant under Rule 801(d)(2)(D). The informant was still the defendant's agent despite the fact that he was also a paid informant. United States v. Summers (5th Cir.) 598 F.2d 450.

HYPNOSIS - WITNESSES

Using hypnosis to refresh the memory of a witness is proper in the Ninth Circuit and "in many jurisdictions." "The fact of hypnosis, if disclosed to the jury, may affect the credibility of evidence, but not its admissibility." United States v. Awkard (9th Cir.) 597 F.2d 667.

IDENTIFICATION - LINEUP

The use of two photos of the defendant in a lineup was not unduly suggestive since the witness identified the defendant before seeing the second photograph. State v. Cobb, (Minn.) 279 N.W.2d 832.

JOINDER

The trial court acted properly in joining a bail jumping charge against the defendant with the other substantive offenses. (Footnote cites Ninth Circuit permission to join escape charges with related substantive offenses.) Grant v. United State (D.C.App.) 402 A.2d 405

JUVENILES

The state does not have to prove the defendant's age beyond a reasonable doubt in an adjudication of juvenile delinquency. In Re Greene (Ill.) 390 N.E.2d 884.

MARITAL PRIVILEGE

The statutory and common law marital communication privilege does not extend to situations of cohabitation even after Marvin v. Marvin. People v. Delph (Cal.App.) 156 Cal.Rptr. 422.

RACKETEERING - CONSPIRACY

The defendant's convictions for racketeering and conspiracy to violate the federal racketeering statute were not barred by Wharton's Rule despite the fact that the racketeering statute required concerted action as an element of an offense. United States v. Rone (9th Cir.) 598 F.2d 564.

VOLUNTARINESS OF STATEMENTS

The use of the "agitation, and stroking" technique of questioning, attacking the suspects psychological weaknesses while reassuring him with protestations of friendship, did not render the defendant's confession inadmissible. The officers gave the defendant his Miranda warnings and they did not use any force, promises or threats. Barnason v. State (Fla.App.) 371 So.2d 680.

ADDRESS CORRESPONDENCE TO
WARM SPRINGS STATE HOSPITAL
H. C. XANTHOPOULOS, M.D.
SUPERINTENDENT

Warm Springs State Hospital

WARM SPRINGS, MONTANA 59756

WHEN WRITING
PLEASE GIVE NAME OF PATIENT

VISITING HOURS
9-11 A.M. 1-4 P.M. DAILY

Nov. 27, 1979

Marc F. Racicot
Assistant Attorney General
Bureau Chief
County Prosecutor Services Bureau
Department of Justice
State Capitol
Helena, Montana 59601

Re: Warm Springs Forensic Review Board

Dear Mr. Racicot:

I would welcome any county attorney attending our Forensic Review Board meetings in any case in which they have a special interest. The Board meets in a second floor classroom in the building next to the Administration Building at 1:00 p.m. each Friday.

Notification of the interested county attorneys would probably have to be short and done by phone as the selection of patients to be discussed at a Friday meeting is done on the preceding Friday or during the week days prior to the meeting as space allows. For cases that originally involved alleged serious violent crimes we could change this practice by scheduling them two weeks ahead of time to give interested county prosecutors more time to respond.

I have enclosed a statement as to how the Forensic Review Board is set up. The purpose of the Board is to make recommendations only and we are still following the procedure of notifying or requesting permission from the appropriate county attorney or district court.

Sincerely yours,

James E. Hamill, M.D.

James E. Hamill, M.D.
Superintendent

JEH/mlm
Enclosure

RECEIVED
NOV 29 1979
COUNTY PROSECUTOR SERVICES
Helena, Montana

WARM SPRINGS STATE HOSPITAL
WARM SPRINGS, MONTANA

FORENSIC REVIEW BOARD

I. PURPOSE: To review Criminal Court-Ordered patients and to make recommendations regarding various treatment options, such as, but not limited to, proper unit, work permits, ground parole, supervised off-grounds shopping or recreation trips, home visits and conditional releases when appropriate.

II. MEMBERS:
1. Superintendent, Director of Treatment Services, all Psychiatrists.
2. All Unit Supervisors
3. Patient's Attorney
4. Mental Health Professionals, including Psychiatric Nurses, Psychologists, Social Workers and Rehabilitation Therapists.
5. Recording Secretary - (non-voting).

III. (A) Personnel in the above categories will be appointed to serve on the Board for terms of 6 to 10 weeks to allow for overlapping, continuity and experience.

(B) A minimum quorum for any Board meeting will consist of the Superintendent, Clinical Director or designated representative, and at least one other psychiatrist, two unit supervisors, and two mental health professionals. Board recommendations or decisions will require at least a 2/3 majority of voting members present.

(C) Professional personnel from a particular patient's unit or program may present material or opinions to the Board but cannot vote on cases from their own programs.

(D) Youth Court Orders may be considered at the request of the supervisor or designated representative from the Children's Unit.

(E) The Board will meet as often as required to handle the work-load.

(F) The patient should appear at the board meeting for a personal interview.

James E. Hamill, M.D.
Superintendent

JEH/mlm